



Kirkland & Ellis' skilled trial attorneys beat back large, long-running class actions against clients Raytheon Co., The Dow Chemical Co. and R.J. Reynolds Tobacco Co., earning them a spot among *Law360's* Class Action Practice Groups of 2011.

# Class Action Group of the Year:

# KIRKLAND

Kirkland attorneys have been involved in class action defense for more than four decades, since the creation of the Judicial Panel on Multidistrict Litigation in 1968. Today, litigators at the firm have experience in MDLs and class actions in a number of industries, including the tobacco, radiation, pharmaceutical, asbestos, aviation and automotive industries.

A willingness to try cases is one of the main reasons for their success in litigation, including class actions, according to attorneys at the firm.

"From day one, we prepare the case for trial," attorney Doug Kurtenbach said. "Whether a case is going to go to trial or whether it's going to settle, a client is going to get the best result if her lawyer is ready to try the case."

Kirkland's litigators secured a major litigation victory in June, in a \$400 million proposed class action brought by Florida homeowners accusing Raytheon of being responsible for a "toxic plume" that tainted groundwater.

The homeowners settled for just \$7,750 split among five plaintiffs and no attorneys' fees after Kirkland successfully petitioned the Eleventh Circuit to vacate the lower

court's class certification order. As part of the settlement, the plaintiffs' lawyers admitted that no class could be certified and that they had no basis to determine Raytheon's activities posed a health threat.

The "toxic plume" case garnered major publicity, and the Florida homeowners even brought activist and attorney Robert F. Kennedy Jr. to help wage the fight. The adverse publicity was a challenge, lead attorney Eugene Assaf said, but Raytheon combated it by publicly telling its side of the story.

"By the client committing to engage on the facts, you're able to address the publicity issues and get your side of the story out," Assaf said. "I strongly believe that a 'no comment' does not help a client win the hearts and minds of listeners."

In addition to being proactive with publicity, Raytheon also made a strategic decision to

continue discovery during the interlocutory appeal to the Eleventh Circuit, according to Assaf.

"It paid off for Raytheon," he said. "After the appeal, we had developed the evidence for trial and were in fabulous shape. That's why the plaintiffs had to settle."

Assaf stressed that having a client like Raytheon — committed and sophisticated in the intricacies of high-stakes litigation — is crucial to the success of a case. An attorney can't be successful with a client who folds and agrees to settle at the first sign of a problem, he said.

"In these high-profile class actions it is the client who deserves tremendous credit for their judgment, tenacity and perseverance," Assaf said. "We, as lawyers, are fortunate to have clients who go 'all in' on these cases, and have the confidence to see the path to victory — even after some bumps along the road."

Dow was another client willing to take a class action accusing it of negligently releasing dioxin into a river floodplain to trial if necessary.

In July, a Michigan judge refused to recertify a class of more than 3,000 property owners

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in that suit, citing the U.S. Supreme Court's June decision in *Wal-Mart Stores Inc. v. Dukes*. The ruling was the first to apply the *Dukes* decision, which toughened class certification standards, in the context of an environmental mass tort.

The plaintiffs claimed dioxin contamination in the Tittabawassee River floodplain in Michigan, near where Dow operates a plant, had hurt the value of their homes and other properties. A soil sample taken in 2000 near the river had revealed the presence of dioxin, which can cause health problems like cancer, liver disease and birth defects.

But the plaintiffs failed to show the commonality necessary for class certification, the Michigan court said.

While facing the suit, Dow was in the middle of a state and federal regulatory cleanup, making the civil litigation a challenge, according to Kurtenbach, who was the lead attorney on the case. But he and his team were able to show that while some properties did have dioxin, many did not, which was helpful for purposes of certification, he said.

The firm scored another big win in April, when a St. Louis jury returned verdicts in favor of several tobacco companies — including Kirkland's clients R.J. Reynolds, American Tobacco Co. and Brown & Williamson — that had been sued by a

class of Missouri hospitals claiming \$455 million in damages for money spent treating uninsured smokers.

In making their case to the jury, the hospitals had focused on the estimated amount of money — which during the lengthy case had ranged as high as \$4 billion — they had lost treating patients with smoking-related illnesses who could not pay their bills.

But the tobacco companies countered that these cases typically account for only 5 percent of hospital patients. If smoking caused increased patient numbers and costs for 95 percent of the patients were covered, then the hospitals made money overall, the tobacco companies argued.

It was this point that swayed the jury, which ended up voting 9-3 in favor of the tobacco companies. The defense team interviewed a handful of jurors afterward who said the hospitals had not sufficiently shown that they had suffered because of smoking-related illnesses.

The case — which took 12 years to resolve — is a good example of the kind of work the firm's attorneys do, according to Kurtenbach.

In 2011, Kirkland attorney Melissa Ingalls finally got an 11-year-old national class action seeking \$400 million in damages

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against DirecTV resolved after it had gone up and down on appeal twice. The claims, which concerned late fees, were settled for a nominal amount to the named plaintiff, according to Ingalls.

Driving the case towards trial from the beginning helped her eventually get the best result for her client, she said.

“That’s how you best position your client to win at class cert or on appeal and get yourself into a favorable settlement position,” Ingalls said. “Being a Kirkland litigator means being a trial lawyer. It’s what makes Kirkland’s overall litigation practice so successful.”